Filed 12/6/16 P. v. Esguerra CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ENRICO DASIG ESGUERRA, Defendant and Appellant.	A144295 (San Mateo County Super. Ct. No. SC078917A)

Enrico Esguerra was convicted by jury of possessing marijuana for sale and transporting marijuana. He argues the trial court erred in allowing the prosecution to introduce evidence, pursuant to Evidence Code section 1101, subdivision (b) (section 1101(b)),[1] of similar out-of-state offenses for which he suffered convictions. He alleges prosecutorial misconduct in both the presentation of that evidence and argument. We affirm.

I. BACKGROUND

In July 2013, Esguerra was attempting to board a flight from San Francisco International Airport to Dallas, when a search of his carry-on luggage revealed four vacuum-sealed bags containing approximately three and one-half pounds of marijuana. He was charged by information with possession of marijuana for sale in violation of Health and Safety Code section 11359 and transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a). It was alleged that he had two

[1] Undesignated statutory references are to the Evidence Code.

prior felony convictions in Pennsylvania for possession of a controlled substance with intent to deliver and conspiracy to deliver controlled substances.

Prosecution In Limine Motion

Esguerra claimed the marijuana was for his personal medical use. The prosecution moved pretrial, pursuant to section 1101(b),[2] to admit evidence of Esguerra's Pennsylvania felony convictions for the purpose of showing criminal intent. At hearing on the motion, the prosecution produced a certified copy of two May 2010 felony convictions in the Commonwealth of Pennsylvania for delivery of marijuana and criminal conspiracy with the intent of facilitating the delivery of a controlled substance. The prosecution argued Esguerra's intent would be the main issue in the case and the evidence was highly probative as to that intent. Defense counsel argued the evidence should be excluded under section 352[3] as unduly prejudicial because (i) the charges were "essentially the same" as the prior convictions; (ii) the prior convictions were close in time; and (iii) Pennsylvania did not permit the use of marijuana for medical purposes. The court agreed "the critical issue for the jury to determine" was Esguerra's intent and the proffered evidence was probative on that issue. The court tentatively indicated it would allow the evidence at trial, but gave counsel the opportunity to submit further briefing.

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[2] Section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

[3] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

Defense counsel did not submit additional briefing. The court rejected defense counsel's argument that exclusion was required under section 352, granted the prosecution's motion in limine, and allowed Esguerra's prior acts in Pennsylvania to be introduced under section1101(b).

Trial Evidence

Airport screening personnel testified to discovery and seizure of the marijuana from Esguerra's luggage. The marijuana was vacuum-wrapped and sealed in plastic in three separate one-pound packages and one half-pound package in one of Esguerra's carry-on bags. A criminalist tested the contents of one bag and confirmed it contained slightly less than a pound of marijuana.

A Virgin America employee testified that Esguerra made frequent one-way trips between San Francisco and Dallas in the months prior to his arrest. In one instance, Esguerra flew from San Francisco to Dallas on May 13, 2013, back to San Francisco on the following day, and then back to Dallas on May 15, paying over $400 for each flight. On the day of his arrest, Esguerra had a one-way ticket to fly to Dallas.

East Palo Alto Police Officer Clint Simmont testified as an expert as to possession of marijuana for sale. Simmont opened and examined the untested packages and opined that each contained marijuana. He also testified that marijuana from California is worth approximately $1600 more per pound in Texas than it is in California. Simmont opined that, based on the totality of circumstances, the marijuana found in Esguerra's luggage was possessed for sale.

The prosecution also presented evidence of Esguerra's statements to arresting officers. Esguerra told officers he used "an ounce or two" of marijuana daily for "stress," and acknowledged he was on felony probation for a marijuana offense from Pennsylvania. He was not able to say how much he paid for the marijuana and would not say where he bought it. Esguerra said his trip to Dallas was for two to five days. He claimed to live at an address on Union Street in San Francisco, but the address he provided was for a post office box.

Dr. William Eidelman testified for the defense. He initially recommended medical use of cannabis for Esguerra in July 2010, based on complaints of chronic back pain and insomnia. He renewed his recommendation annually thereafter, eventually recommending that Esguerra be permitted to possess up to 15 pounds of marijuana, primarily for ingestion by cooking. He believed an amount of 15 pounds of marijuana would last Esguerra "six months or even a whole year."

About 90 per cent of Eidelman's practice involves marijuana usage recommendations, writing around 2,000 recommendations annually. Eidelman was under interim suspension of his medical license in 2002 as a result of providing medical marijuana recommendations to undercover police officers. The California Medical Board had found cause to revoke or suspend his license in 2004 on grounds that included dishonesty and false reports. He suffered a public reproval from the California Medical Board in 2009 on a complaint of gross negligence, incompetence, failure to perform an adequate patient examination, and failure to maintain adequate records.

Esguerra testified on his own behalf. Esguerra said he was a private chef and couture designer of custom clothing.[4] He used marijuana to deal with anxiety, stress and physical pain as a result of being struck by a car while riding a bicycle in 2006. He was, however, unable to identify any medical professional who treated his injuries from the 2006 accident before his 2010 consultation with Eidelman. Esguerra ingested marijuana by taking a whole marijuana plant and cooking it into butter or oil in bulk, and then from that larger bulk portion using smaller amounts in cooking as needed. He estimated his daily use of marijuana at "an ounce or two" or "more." Esguerra said he earned less than $60,000–$70,000 per year, an amount insufficient to support regular purchases of marijuana in the amounts he claimed to use. He did not know how much money he made in the past year, and he did not file tax returns. Esguerra admitted he was arrested on November 10, 2009, in Philadelphia for possession of over a pound of marijuana—prior

[4] Esguerra told arresting officers that he made leather handbags for a living. He acknowledged at trial that he had not told arresting officers he was a private chef, even though he agreed it was information relevant to his claim of cooking with marijuana.

to his first consultation with Eidelman. With regard to that arrest, he pled guilty to felony charges of possession of marijuana with intent to deliver, and conspiracy to deliver controlled substances. Esguerra was on probation for those convictions at the time of his arrest in the present matter.

Verdict and Sentence

The jury found Esguerra guilty of both charged counts and found true the prior felony conviction sentencing enhancement. The trial court suspended imposition of sentence and imposed a three-year term of probation, with a condition that Esguerra serve six months in county jail.

II. DISCUSSION

Esguerra does not challenge sufficiency of the evidence to support his convictions, but alleges he was prejudiced by erroneous admission of evidence concerning his Pennsylvania marijuana convictions, and by misconduct of the prosecutor in undue emphasis on this evidence. We find no error.

A. *Section 1101*(*b*)

Section 1101, subdivision (a) precludes admission of evidence of a person's character or a trait of character to prove conduct on a specified occasion "[e]xcept as provided in this section . . . ." Section 1101(b) permits the admission of evidence "that a person committed a crime, civil wrong, or other act when relevant to prove some fact when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." The admissibility of evidence of an uncharged offense "depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315, disapproved on another point as stated in *People v. Scott* (2011) 52 Cal.4th 452, 470–471.)

"Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.] 'Since "substantial prejudicial

effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.] [¶] . . . We . . . examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (. . . § 352.)" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) "We review the trial court's determination for abuse of discretion, and view the evidence in the light most favorable to the trial court's ruling." (*People v. Edwards* (2013) 57 Cal.4th 658, 711.) We will not disturb the lower court's exercise of discretion under section 352 unless that discretion was exercised in an " ' "arbitrary, capricious, patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Jones* (1998) 17 Cal.4th 279, 304.)

"Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' " (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." ' " (*Id.* at p. 402.)

Esguerra does not suggest that evidence he previously possessed a significant quantity of marijuana with the intent to deliver it, and he conspired with others to do so, was not highly probative of his intent in possessing three and one-half pounds of packaged marijuana in this instance. Esguerra focuses instead on what he alleges is failure of the trial court to properly exercise its discretion in weighing and balancing the probative value of the prior offenses against their prejudicial effect under section 352.

He contends the trial court considered only the relevance of the evidence, and nothing in the record indicates the court balanced the relevance against its prejudicial effect. We read the record very differently than Esguerra would have us.

In the colloquy at hearing on the prosecution's in limine motion, the court first agreed with the prosecutor's position that "the critical issue for the jury to determine" was Esguerra's intent, "and that's where the 1101(b) material becomes probative." Responding to Esguerra's objections that the evidence was unduly prejudicial, the court said: "[s]o the prejudice issue, I think, has been acknowledged and as defense says, it's all prejudicial. I believe the statutes and law acknowledge that, that it's really not an attempt to avoid prejudice; it's the balancing factor as to whether the prejudice is outweighed by other issues." The court advised counsel "that I'm inclined to allow the evidence under 1101(b) and to overrule the objection . . . ," but deferred a final ruling to allow Esguerra to submit further briefing on his contention that Pennsylvania's lack of a medical use defense rendered the convictions inadmissible in a California prosecution. No additional authority was submitted, and at the continued hearing Esguerra again argued the evidence was inflammatory and too prejudicial. The court overruled the objections, stating that ". . . for all the reasons that we've already discussed and for the additional reasons by the deputy district attorney, which I will adopt as rational[e], I will allow the prior from Pennsylvania to be used under 1101(b) and grant the People's motion in limine . . . ." Esguerra faults the court for not again expressly discussing section 352 and setting forth its analysis on the record.

As Esguerra acknowledges, a court is not required to "expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under . . . section 352." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1285; *People v. Arias* (1996) 13 Cal.4th 92, 155 ["the court need make no express statements on these issues so long as the record affirmatively shows that weighing occurred, and there is an adequate basis for appellate review"].) Esguerra notes that his counsel, in arguing against the evidence's admission, "returned to section 352 time and time again." The court made quite clear that, having

found the evidence probative, it recognized the need to consider "the balancing factor as to whether the prejudice is outweighed by other issues." Esguerra's assertion that it did not is specious.

Nor do we find any abuse of the court's discretion in admitting the evidence. The evidence had substantial probative value. "In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under [section 1101(b)], to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs." (*People v. Williams* (2009) 170 Cal.App.4th 587, 607.) Esguerra's protests notwithstanding, the risk of undue prejudice was minimal.[5] "[T]he test for prejudice under . . . section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) There was nothing particularly inflammatory about the prior charges, or the facts underlying them.[6] Esguerra was found in possession of packaged marijuana, as he was in the present case, and admitted he intended to distribute it. Because he had been convicted of the prior offenses, " 'the jury would not be tempted to convict [him] simply to punish him for the other offenses, and . . . the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses.' " (*People v. Lewis, supra,* 46 Cal.4th at p. 1287.)

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[5] Although not discussed by either party in briefing, we also note that a determination of the fact of the prior convictions was not bifurcated. The evidence of the convictions, and the nature of the convictions, was therefore properly before the jury without regard to section 1101(b).

[6] Esguerra complains that "[d]espite probative value, this evidence was likely to inflame the jurors against [him], by suggesting that he be considered to *be a drug dealer*." Esguerra seems to not appreciate that this contention is inherent in the nature of both the prior and present charges.

B. *Prosecutorial Misconduct*

Esguerra alleges prosecutorial misconduct in two respects. First, he contends the prosecutor impermissibly utilized the section 1101(b) evidence as evidence of criminal propensity. He complains the prosecutor emphasized the prior offenses in her opening statement and closing arguments, in her examination of her primary police witness, and in her cross-examinations of Esguerra and Eidelman. Second, he asserts the prosecutor improperly suggested Esguerra had a burden to prove his innocence. Neither contention has merit.

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' " (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305; *People v. Hill* (1998) 17 Cal.4th 800, 819; see *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

We first agree with the People that Esguerra forfeited claims of prosecutorial misconduct by failing to make specific objection at trial to the prosecutor's questions about the convictions and to her comments in argument to the jury. " '[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Esguerra responds that he was excused from the necessity of objection and request for admonition because it would have been futile in light of the court's ruling that the section 1101(b) evidence was admissible. (See *People v. Hill, supra,* 17 Cal.4th at p. 820.) The argument fails. Esguerra's claims of error relate to the manner in which the prosecutor presented and utilized the evidence. While he preserved his argument of *judicial* error in admission of the evidence at all, nothing excused him from raising issues of *prosecutorial* error, and from seeking to have the trial court

"control the prosecutor's blatant appeals to character and propensity conclusions under the guise of proving intent and impeaching [Esguerra] and his witness."

Moreover, we find no misconduct. A prosecutor does not commit misconduct by introducing, or commenting on admissible evidence. (*People v. Foster* (2010) 50 Cal.4th 1301, 1350.) The prosecutor was also very clear in her closing argument that the jury could only consider evidence regarding the Pennsylvania offenses as to Esguerra's intent, and for impeachment: "Now we talked a lot about [Esguerra's] Pennsylvania prior. And why did we do that? It wasn't to, you know, bring up old stuff essentially. It wasn't to retry him for something that happened a while ago. But why is it relevant? Because it goes to his intent in this case, which . . . is the only reason we're here. What was the intent with which he possessed the marijuana? [¶] . . . [¶] And why did we have to go into so much detail about that? Well, because he started lying about it. Now it becomes an impeachment thing." She again emphasized the purpose of the evidence in rebuttal argument: "[N]o one is saying you should convict him in this case because he has a prior in Pennsylvania. But like the Court has made clear, you can use that to determine his intent in this case. . . . [¶] And Counsel is arguing that that's only brought up to prejudice you. No. Its brought up again for two reasons: impeachment, because he lied about it, and to show you what his intent was." Esguerra presents no authority for his apparent suggestion that repeated citation to admissible section 1101(b) evidence, during testimony or in argument, or its use in impeachment of a testifying defendant, transmutes that evidence by repetition into prohibited propensity evidence.

Even if it were not forfeited, his claim that the prosecutor committed misconduct in attempting, in closing argument, to shift the burden of proof to him, also fails on the merits. He accuses the prosecutor of "artfully suggest[ing] that the burden of proof should shift to the defendant—while still repeating the mantra that a defendant does not have to prove his innocence." The statements he complains of do nothing more than argue that the evidence Esguerra chose to present (his own testimony and that of

Eidelman) was deficient,[7] and Esguerra had failed to produce a medical expert to testify that his marijuana usage was reasonably related to his actual medical needs.

A prosecutor may not suggest that "a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) As Esguerra admits, the prosecutor here reiterated that the prosecution had the burden of proof to establish defendant's guilt beyond a reasonable doubt, and that defendant had no duty or burden to produce any evidence. It is not misconduct for a prosecutor to comment on the quality of the evidence that was produced by the defense, or the "lack of *evidence*, which might have been presented in the form of physical evidence or testimony other than that of defendant." (*Id*. at p. 1340.) "A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

"When the issue 'focuses on comments made by the prosecutor before the jury, [as in this case], the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203.) "Although defendant singles out particular sentences to demonstrate misconduct, we must view the statements in the context of the argument as a whole." (*Id*. at p. 1203; *People v. Morales* (2001) 25 Cal.4th 34, 44–47 [prosecutor's statement must be evaluated in the context of the entire record, including instructions and the argument as a whole].) We find no reasonable likelihood the jurors would have understood the prosecutor's argument as imposing any burden on defendant.

III. DISPOSITION

The judgment is affirmed.

[7] The prosecutor commented, "If they're going to present a defense, then the defense has to make sense, and it has to fill in the holes."

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BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.